Wayne Holloway V04793
CMC EAST
P.O. BOX 8101
SAN LUIS OBISPO, CA 93409

FILED
MAY 12 2008
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY KM DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Wayne Holloway)
Petitioner,)
v.)
John Marshall, Warden)
Respondent.)

'08 CV 0861 JM AJB
Case No. ___________

~~Petition for Writ of~~ Habeas Corpus under 28 USCS 1651 (All Writs Act).

em banc review requested

To Presiding Justice and its legal Representative of the federal district court, I the Petitioner Wayne Holloway presents this writ petition in light of the district court rejection to the merits of Petitioner's constitutional invalidity strike prior claim. The dist court in their denial cited Lackawanna County Dist Atty v. Coss at 532 U.S. 394, 403-04, in which this holding by the U.S. Supreme Court curtailed the defendant's right to challenge a strike prior conviction under 2254 of the United States Code volume number 28.
(Take Judicial Notice to Dist Court's order at no. 06cv0226-IAB)

Factual and Procedural Background

On about August 22, 2003, Petitioner Holloway filed a motion challenging the constitutional validity of his strike prior (CT 0019). (Sup Ct no. SCD172406) This motion, of course, was denied and eventually lead to a sentence enhancment govern by the three strike law. (CT 0063) Afterwards, this strike prior claim was procedually raised on direct appeal; and also presented in a timely petition for review to the California Supreme Court, in which the state high court denied review without stating prejudice. (S127951)

However, Petitioner in turn sought relief in the fed dist court by filing a 28 USC 2254 writ of habeas corpus -- arguing once again the constitutionality of his strike prior. The district court subsequently denied to entertain the strike prior claim under 28 USC 2254 and cited that the United States Supreme Court has curtailed a petitioner's ability to collaterally attack a prior conviction used to enhance a present sentence. (e.g. Lackawanna County Dist Att v. Coss at 532 U.S. 394, 403-04-Take Judicial Notice to Dist Court's order 06cv00226) Therefore, 28 USC section 1651 becomes applicable...

Standard Under 28 USCS 1651

The all writs act (28 USCS 1651) is meant to be used only in exceptional case where there is clear abuse of discretion or usurpation of judicial power. (Labuy v. Howes Leather Co. 352 U.S. 249)

Under federal practice, extroardinary writs under 1651 are reserved for really extroardinary causes, and then only to confine inferior court to lawful exercise of its authority when it is duty to do so. (Platt v. 3M 376 U.S. 240) And, it has the jurisdiction to issue alternative writs in proper case, but these writs should be resorted to only where appeal is clearly inadequate remedy; as extraordinary remedies they are reserved for really extraordinary causes. (U.S. v. Richardson 204 f2d 552; e.g. Penn v. U.S. Marshall Services 474 U.S. 34, 43)

Argument

State Court Must Strike A Prior Conviction Which Was Unconstitutional Obtained, Otherwise Ruling On Motion Challenge Was Contrary To, Or Involved An Unreasonable Application Of, Clearly, Establish Federal Law As Determined By The Supreme Court Of The United States

A. Circumstances Surrounding Strike Prior of Residential Burglary:

On June 13, 1993, Defendant Wayne Holloway having been advised his constitutional rights which includes his rights to be tried by a jury of twelve in his presence and the right to confront witnesses or rebutt evidence in defense. (5th, 6th, and 14th Amend) After understanding these rights Defendant Holloway stood trial for the residential burglary claim, but apparently Holloway was excluded from a jury requested readback of an adverse witness testimony in spite the People's stipulation of Holloway's presence at all time when the jury is in the panel; and in spite Holloway's objection to this adverse witness testimony by testifying at trial under oath that he did not admit or told anyone that he committed the burglary because he was "hungry" (CT0030-0032). Finally, as a result of these trial court errors Defendant Holloway suffered guilty verdict at the hands of the jury. (Take Judicial Notice to Sup Ct No. SF78949)

B. Constitutional Rights Violation:

(i)

Criminal Defendants has a Constitutional Due Process right to be personally present during readback of adverse witness testimony and Criminal Defendant has a Constitutional right to have a readback proceedings stenograph on record

Generally, a criminal defendant has a vested right to be presence at his trial at all times especially when evidence is taken before the trier of facts (jury). His rights to be present at trial is protected under both the federal and state constitutions. (U.S. Const.,

6th & 14th Amends., U.S. v. Gagnon 470 U.S. 522; Illinois v. Allen 397 U.S. 337; Pointer v. Texas 380 U.S. 400; Lewis v. U.S. 146 U.S. 370; Hopt v. Utah 110 U.S. 574; Snyder v. Mass 291 U.S. 97; Peo v. Waidla 22 Cal4th 741; Peo v. Lewis 144 Cal.App3d 279 and so forth)

Under California Law, the state constitution guarantee that the defendant in a criminal cause has the right to be personally present with counsel, and to be confronted with the witness against defendant (Cal Const Art I sec 15), whereas section 977 and 1043 of the California state penal code implements the state constitutional protection. Under Federal Law, the right of the accused to be present is obligatory upon the state, and the rules also includes the defendant's right to be present whenever the court communicates with jury. (Shields v. U.S. 273 U.S. 583)

Here, Holloway was guaranteed the right to be present during a readback or when the jury comes back into the court room as agreed upon by the People. (CT0034) Although the only plausible explanation for Holloway's absence would have been if Holloway voluntarily excuse himself from the court, and even then it had to be authorize under section 977. Penal Code Section 977 authorize the presence of the criminal defendant during a requested readback to the jury. The section states the following : "In all cases in which a felony is charged, the accused must be present...during those portions of the trial when evidence is taken before the trier of fact...the accused shall be personally present at all other proceeding unless he shall with leave of court, execute in open court, a written waiver of his right to be personally present, approved by his counsel." At present, let the certified record reflex that their is no such waiver or anything in lieu of a waiver executed on part by Holloway or even his then attorney - Wayne Gomez. (Take Judicial Notice to the south bay record ordered by Judge Dave Gill dept-28, RT35)

So as intended, a criminal defendant has a constitutional right to be personally present in the courtromm when a readback of any kind is done for a deliberating jury. Though, a criminal defendant' right to be personally present during readback is not limited to just mere present, but the criminal defendant has the right to have this request readback proceeding stenograph or record on the certified record on appeal.

In Bustamante v. Eyman 456 F2d 269 et al, the Circuit Court held that a criminal defendant has the right to be present with attorney during **readback and the right** to have that proceeding recorded by the stenographer; otherwise, the verdict against defendant can not stand- we reverse...

Conclusion

For the above-stated reasons, the relief sought in the petition should be granted.

Prayer For Relief

WHEREFORE, petitioner prays the court :

1. issue a writ of habeas corpus
2. declare the rights of Petitioner Holloway
3. reverse the sentence or strike the burglary prior
4. expunge all reference to the underline burglary conviction
5. grant any other and further relief this court deems just, fair, and equatable.

Dated May 08, 2008

Respectfully Submitted

Wayne Holloway
In Pro Per

Verification

I declare under penalty of perjury to the foregoing that its true and correct to the best of my knowledge supported my the certified record on appeal (Dist Ct no. cv-06-00226-LAB) (see also the certified record under Sup Ct No. SF78949)

Petitioner

STATE OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

I am the party of the above entitled actions, a citizen of the United States and over the age of eighteen years, and a resident of San Luis Obispo County. My current address is:

Wayne Holloway
California Men's Colony-East
P.O. Box 8101 Room______
San Luis Obispo, CA. 93409-8101

I CERTIFY (OR DECLARE), UNDER PENALTY OF PERJURY, THAT THE FOREGOING IS TRUE AND CORRECT.
EXECUTED ON May 8, 20 08, AT SAN LUIS OBISPO, CALIFORNIA, 93409-8101.

PETITIONER

....

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

I AM A RESIDENT OF SAID COUNTY, I AM OVER THE AGE OF EIGHTEEN YEARS AND ~~NOT~~ A PARTY TO THE ABOVE ENTITLED ACTION. MY BUSINESS ADDRESS IS:

Dwayne Holloway
CALIFORNIA MEN'S COLONY-EAST
P.O. BOX 8101 / Room 2178
SAN LUIS OBISPO, CALIFORNIA 93409-8101

ON May 08, 20 08, I SERVED THE WITHIN petition for writ of Habeas Corpus and Request for Appointment of Counsel

ON THE PARTY: office of Atty General, S.P CT Appeal Section

IN SAID ACTION, BY PLACING A TRUE COPY THEREOF IN A SEALED ENVELOPE WITH POSTAGE THEREON PREPAID, IN THE UNITED STATES MAIL, AT CALIFORNIA MEN'S COLONY, SAN LUIS OBISPO, CALIFORNIA, 93409-8101, ADDRESSED AS FOLLOWS:

office of Atty General
P.O. Box 85266
San Diego, CA 92186-5266

Clerk of Sup CT
Sup CT Appeal Section
P.O. Box 128
San Diego, CA 92112

I DECLARE, UNDER PENALTY OF PERJURY, THAT THE FOREGOING IS TRUE AND CORRECT.
EXECUTED ON May 08, 20 08, AT SAN LUIS OBISPO COUNTY, CALIFORNIA.

SIGNATURE OF DECLARANT

(REV.6/07)

JS44
(Rev. 07/89)

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE SECOND PAGE OF THIS FORM.)

FILED
MAY 12 2008
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

I (a) PLAINTIFFS

Wayne Holloway

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF San Luis Obispo
(EXCEPT IN U.S. PLAINTIFF CASES)

DEFENDANTS

John Marshall

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

Wayne Holloway
PO Box 8101
San Luis Obispo, CA 93409
V-04793

ATTORNEYS (IF KNOWN)

'08 CV 0861 JM AJB

II. BASIS OF JURISDICTION (PLACE AN x IN ONE BOX ONLY)

☐ 1 U.S. Government Plaintiff
☒ 3 Federal Question (U.S. Government Not a Party)
☐ 2 U.S. Government Defendant
☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN X IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT (For Diversity Cases Only)

	PT	DEF		PT	DEF
Citizen of This State	☐1	☐1	Incorporated or Principal Place of Business in This State	☐4	☐4
Citizen of Another State	☐2	☐2	Incorporated and Principal Place of Business in Another State	☐5	☐5
Citizen or Subject of a Foreign Country	☐3	☐3	Foreign Nation	☐6	☐6

IV. CAUSE OF ACTION (CITE THE US CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY).

28 USC 1651

V. NATURE OF SUIT (PLACE AN X IN ONE BOX ONLY)

CONTRACT
☐ 110 Insurance
☐ 120 Marine
☐ 130 Miller Act
☐ 140 Negotiable Instrument
☐ 150 Recovery of Overpayment &Enforcement of Judgment
☐ 151 Medicare Act
☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)
☐ 153Recovery of Overpayment of Veterans Benefits
☐ 160 Stockholders Suits
☐ 190 Other Contract
☐ 195 Contract Product Liability

REAL PROPERTY
☐ 210 Land Condemnation
☐ 220 Foreclosure
☐ 230 Rent Lease & Ejectmant
☐ 240 Tort to Land
☐ 245 Tort Product Liability
☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
☐ 310 Airplane
☐ 315 Airplane Product Liability
☐ 320 Assault, Libel & Slander
☐ 330 Federal Employers' Liability
☐ 340 Marine
☐ 345 Marine Product Liability
☐ 350 Motor Vehicle
☐ 355 Motor Vehicle Product Liability
☐ 360 Other Personal Injury

PERSONAL INJURY
☐ 362 Personal Injury-Medical Malpractice
☐ 365 Personal Injury - Product Liability
☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
☐ 370 Other Fraud
☐ 371 Truth in Lending
☐ 380 Other Personal Property Damage
☐ 385 Property Damage Product Liability

CIVIL RIGHTS
☐ 441 Voting
☐ 442 Employment
☐ 443 Housing/Accommodations
☐ 444 Welfare
☐ 440 Other Civil Rights

PRISONER PETITIONS
☐ 510 Motions to Vacate Sentence Habeas Corpus
☐ 530 General
☐ 535 Death Penalty
☒ 540 Mandamus & Other
☐ 550 Civil Rights
☐ 555 Prisoner Conditions

FORFEITURE/PENALTY
☐ 610 Agriculture
☐ 620 Other Food & Drug
☐ 625 Drug Related Seizure of Property 21 USC881
☐ 630 Liquor Laws
☐ 640 RR & Truck
☐ 650 Airline Regs
☐ 660 Occupational Safety/Health
☐ 690 Other

LABOR
☐ 710Fair Labor Standards Act
☐ 720 Labor/Mgmt. Relations
☐ 730 Labor/Mgmt. Reporting & Disclosure Act
☐ 740 Railway Labor Act
☐ 790 Other Labor Litigation
☐ 791 Empl. Ret. Inc. Security Act

BANKRUPTCY
☐ 422 Appeal 28 USC 158
☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
☐ 820 Copyrights
☐ 830 Patent
☐ 840 Trademark

SOCIAL SECURITY
☐ 861 HIA (13958)
☐ 862 Black Lung (923)
☐ 863 DIWC/DIWW (405(g))
☐ 864 SSID Title XVI
☐ 865 RSI (405(g))

FEDERAL TAX SUITS
☐ 870 Taxes (U.S. Plaintiff or Defendant)
☐ 871 IRS - Third Party 26 USC 7609

OTHER STATUTES
☐ 400 State Reappointment
☐ 410 Antitrust
☐ 430 Banks and Banking
☐ 450 Commerce/ICC Rates/etc.
☐ 460 Deportation
☐ 470 Racketeer Influenced and Corrupt Organizations
☐ 810 Selective Service
☐ 850 Securities/Commodities Exchange
☐ 875 Customer Challenge 12 USC
☐ 891 Agricultural Acts
☐ 892 Economic Stabilization Act
☐ 893 Environmental Matters
☐ 894 Energy Allocation Act
☐ 895 Freedom of Information Act
☐ 900 Appeal of Fee Determination Under Equal Access to Justice
☐ 950 Constitutionality of State
☐ 890 Other Statutory Actions

VI. ORIGIN (PLACE AN X IN ONE BOX ONLY)

☒ 1 Original Proceeding ☐ 2 Removal from State Court ☐ 3 Remanded from Appelate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VII. REQUESTED IN COMPLAINT: ☐ CHECK IF THIS IS A CLASS ACTION UNDER f.r.c.p. 23 **DEMAND $**
Check YES only if demanded in complaint:
JURY DEMAND: ☐ YES ☐ NO

VIII. RELATED CASE(S) IF ANY (See Instructions): JUDGE Docket Number

DATE 5/12/2008 ~~SIGNATURE OF ATTORNEY OF RECORD~~

R. Muller